

The Past, Present, and Future of Indigent Defense in New York:
Where has 10 years of reform gotten us and where are we going?
Hon. Jonathan Lippman - June 6, 2014

Good morning. I am delighted to be here among so many distinguished criminal defense leaders and practitioners, and I would like to thank the New York State Bar Association and Vince Doyle for inviting me to address this summit, and to reflect on the progress and challenges over these past 10 years and to look forward to the future of indigent defense in New York.

It has been over half a century since the landmark United States Supreme Court decision, *Gideon v Wainwright*, yet there remains a disturbing disconnect between the promise of the *Gideon* decision and the reality of our criminal justice system. While much progress has been made over the last 50 years and especially in the last 10 years, the truth is that many of our dedicated public defenders are still laboring under excessive caseloads, unable to get to know their individual clients and unable to thoroughly investigate the facts. As a result, our public defenders often lack the time and resources to build a truly competent legal defense in each and every case. Particularly in misdemeanor courts, defendants are often represented without sufficient attorney-client contact, contrary to the spirit and intent of *Gideon* and its progeny.

As Chief Judge of the State, it is my prerogative, however, to find ways not only to preserve the values of *Gideon* but to go beyond them to ensure that criminal defense representation has a broader vision – one that is responsive to the complex world we live in today. And all of us, as members of the profession, have a moral and ethical obligation to pursue the ideal of equal justice for all, rich and poor, high and low alike.

Surely, the lack of adequate legal representation for low-income New Yorkers is the greatest threat to the continued legitimacy of our justice system. As we consider the past 10 years of progress and reform, one of the turning points was the formation of the Commission on the Future of Indigent Defense Services in 2004 and the conclusions drawn from the report issued in 2006. The Commission, co-chaired by Professor Bill Hellerstein and the late Burton Roberts, determined that New York's indigent defense system was in many respects dysfunctional and incapable of providing poor defendants with effective legal representation, and the Report described New York's indigent defense system as a fragmented, patchwork system that lacked uniformity, oversight, and resources. The Commission found that the varying levels of funding in many regions throughout the state led to considerable stresses on the indigent defense system and created an uneven quality of representation from jurisdiction to jurisdiction. The findings of the Commission even led to a systemic legal challenge to the constitutionality of the State's indigent defense system relating to a criminal defendant's right to meaningful and effective assistance of counsel. While the lawsuit proceeds on the merits, it is incumbent upon us at a policy level to take the necessary steps to improve indigent defense in our state.

One significant milestone was achieved in 2010 with the establishment by statute of the Statewide Indigent Legal Services Office, whose Board I am privileged to chair, in order to protect the fairness and integrity of our criminal justice system in New York. Our mission is to improve the quality of representation provided to persons who are entitled by law to the assistance of counsel yet who cannot afford to retain an attorney, and the legislation gives us broad statutory powers to carry out this mission. The creation of the

Board and the Office brings the three branches of government together in support of this effort. By act of the Legislature, I, as the institutional head of the judicial branch, serve as chair of the Board of an executive branch entity devoted to funding and reforming the criminal defense function. Under the superb leadership of Bill Leahy, who comes to us with four decades of experience in this field, the ILS Office works to identify and address major deficiencies, such as excessive caseloads, inadequate or non-existent investigatory capacities, lack of attorney qualification standards, insufficient training and supervision, lack of oversight for appellate representation, as well as, in some areas of the state, the arraignment of accused persons without affording them the assistance of counsel.

Since its creation, the Board has used our discretionary grant-making authority to encourage and support localities in crafting creative approaches to improve the delivery of criminal defense services. We have allocated over \$20 million in funding to support counsel at defendants' first court appearance in lower-level criminal courts and to fund the efforts of counties to comply with *Padilla v Kentucky* – and the results of our efforts are already manifest. The active participation of defense counsel has changed the dynamics of the arraignment process in upstate counties in important ways, and thousands of defendants in Monroe, Dutchess, Erie, and numerous other counties have benefited from representation at first appearance. The Board is also devoting over \$12 million in funding to alleviate excessive workloads in upstate defender offices and for the development of quality control measures in assigned counsel programs. The monies for these and other grants come from the Indigent Legal Services Fund in our State – and the unique part of this legislative schematic is that the other two branches have entrusted

our independent Board headed by the Chief Judge to create a vision for indigent defense, and to dispense the monies from the Indigent Legal Service Fund in a manner best designed to level the playing field in the criminal justice system. From my perspective, the role is totally consistent with my own duty as Chief Judge to ensure equal justice in courthouses across our state.

In addition to all the important work that the ILS Office continues to do, perhaps the most significant step forward with respect to ensuring a level playing field for New Yorkers has been the phase-in of caseload caps for attorneys representing indigent criminal defendants in New York City. Pursuant to State legislation passed in 2009, we adopted court rules that called for a four-year phase-in of caseload caps that went into full effect this past April -- to ensure compliance with nationally recognized caseload limits. Attorneys in New York City are now limited to handling no more than 400 misdemeanors or 150 felonies in a 12-month period, with felonies representing the equivalent of 2.66 misdemeanors in mixed caseloads. Since the program's implementation, it has dramatically eased crippling burdens on defenders and led to marked improvement in the quality of representation for low-income defendants in New York City.

As we look to the future of indigent legal defense in our state, it is apparent that the concept of caseload limits should be extended outside of the City in order to improve the quality of representation for low-income criminal defendants. In the most recent Judiciary budget, \$57 million dollars was devoted to bringing New York City caseloads within the nationally recognized limits. For the remaining 57 upstate counties in New York, the ILS Office estimates that an additional \$111 million dollars is needed to fully fund compliance with maximum caseload limits. The ultimate solution to ensuring

consistent and high quality representation in our indigent defense system may well be a full State takeover of the cost and regulation of representation. However, adopting and funding caseload limits in all of the state's 62 counties would be a major leap forward in guaranteeing equal justice for all New Yorkers -- and make our state a national leader in providing this vitally important service.

The progress we have made thus far on issues relating to improving criminal defense representation in New York, that I have outlined today, is encouraging. Yet, there is still so much work to be done to achieve qualified and competent legal representation for all of our state's indigent defendants. It is not enough for us to just sit in an ivory tower and talk about the promise of *Gideon* every 50 years. We need constant creativity, fresh ideas, and engagement with the obstacles that are preventing New Yorkers from accessing justice in our criminal courts. Our state court systems are laboratories for reform and innovation, contributing to – and sometimes driving – important policy changes in criminal justice in so many areas.

Our criminal justice system is ripe for reform on a variety of fronts, and our focus on indigent defense representation cannot be in a vacuum, separate and apart from the challenging issues that we face in the criminal justice arena that go to the heart of fairness and justice when one's liberty is at stake. Starting with our system of pre-trial justice, it remains glaringly deficient. To address this issue, the judiciary will continue to promote bail reform -- including revamping our bail statutes to require public safety considerations and a presumption of release for non-violent offenders, investing in supervised release programs, and exploring alternatives to traditional bail bonds. The current status quo where thousands of indigent defendants are incarcerated merely because they cannot

meet a minimum bail amount – as low as \$500 – is disgraceful. Today, in far too many cases, neither judges, prosecutors, nor defense attorneys determine issues of a defendant’s liberty pending trial – the bail bondsman does based on a profit-making incentive! There has to be a better way to deal with pre-trial justice in our state, and we remain committed to that end.

The judiciary, in partnership with the other branches of government and stakeholders in the criminal justice community, is also pioneering new approaches to address the scourge of wrongful convictions. We have introduced legislation mandating the videotaping of interrogations in the most serious felony cases to help reduce instances of false confessions and requiring that pretrial line-ups and photo identifications be administered in a double-blind, fair manner. We are also submitting legislation to reform criminal discovery, by requiring prosecutors to disclose prior witness statements and expert reports well in advance of trial. These reforms will make our criminal discovery process fairer and will protect the integrity of our justice system.

Another critically important area is juvenile justice, where New York remains one of only two states in the country that prosecutes 16 and 17-year-olds as adults. The bill the judiciary has proposed will significantly reform the way the State handles 16- and 17-year-olds charged with nonviolent crimes and emphasizes treatment, rehabilitation, and effective reintegration. I am greatly encouraged that Governor Cuomo has formed a state commission to produce a plan for raising the age of criminal responsibility, and I am eagerly awaiting the commission’s recommendations. It is abundantly clear that our adult criminal justice system is not designed to address the unique needs of adolescents, and

we can all agree that reform is urgently needed to deliver justice to the young people of our state that is fair, effective, and rational.

The judiciary's most recent initiative in criminal justice reform touches upon New York's criminal history record policies. We are proposing legislation that will expunge old misdemeanor convictions if the individual has not been re-arrested within 7 years, and non-violent felonies after 10 years. Further, through our own administrative powers, we have implemented a new policy in which the court system will no longer release criminal record information for individuals who have not been re-arrested within 10 years of the date of a misdemeanor conviction. Individuals who have led an otherwise law-abiding lifestyle will no longer be scarred for life, denied housing, education and job opportunities, and permanently burdened by a single misdemeanor conviction.

In the realms of juvenile justice, wrongful convictions, bail reform, criminal history records, and indigent criminal defense and so many other areas – the judiciary has acted as an incubator for change. Strong judicial leadership is necessary with respect to the future of indigent defense in our state, and the same leadership is necessary with respect to the broad panoply of criminal justice reform issues. But, this is a partnership, with all of the players in the justice system joining together to pursue justice. This is the goal for all of us. The courts, the profession, the defense and prosecutorial communities cannot stand idly by while our state's indigent defendants receive inadequate representation and equal justice is denied. The playing field must be levelled if the pursuit of justice is ever to be fulfilled. Fifty years after Gideon, we have our work cut out for all of us. I truly believe, however, that we've made significant incremental progress and that together we can and will make the ideal of equal justice a reality for all New Yorkers. Thank you.